Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DR. BEN BRANCH, TRUSTEE OF BANK OF NEW ENGLAND CORPORATION,
on behalf of and in the name of
MAINE NATIONAL BANK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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May 6, 1996

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QUESTIONS PRESENTED

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 makes a federally insured bank liable to the United States for all losses incurred or anticipated by the government due to failure of a different insured bank, if the two banks are owned by the same holding company. 12 U.S.C. § 1815(e)(1)(A). The questions presented are:

(1) Whether the government's use of Section 1815(e)(1)(A) to assess liability against and permanently appropriate all of the assets of a financially healthy bank constitutes a taking under the Fifth Amendment where the healthy bank had always maintained a separate corporate existence, never played any role in the affairs of the failed bank, and did not cause or contribute to the government's losses deriving from its failure, and where Section 1815(e)(1)(A) was enacted 100 years after the healthy bank began operations and four years after the two banks became commonly owned.

(2) Whether a targeted governmental monetary assessment constitutes a taking under the Fifth Amendment where the assessment is not a fair approximation of, or roughly proportionate to, benefits received or social costs caused by the assessed party, a question as to which the federal courts of appeals and state supreme courts are in conflict.

LIST OF PARTIES

The caption lists all of the parties to the proceedings before the United States Court of Appeals for the Federal Circuit, whose judgment is the subject of the instant petition.

RULE 29.6 LISTING

Maine National Bank, now in receivership, is a wholly-owned subsidiary of the Bank of New England Corporation ("BNEC"), a bank holding company now in liquidation proceedings pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.*. Maine National Bank has no subsidiaries. BNEC has no parent or nonwholly-owned subsidiaries.

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on behalf of and in the name of
MAINE NATIONAL BANK,
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UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Ben Branch, on behalf of Maine National Bank, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 69 F.3d 1571 (Fed. Cir. 1995) and is reprinted at App. 1a.[1] The opinion of the United States Court of Federal Claims is reported at 31 Fed. Cl. 626 (1994) and is reprinted at App. 38a. The orders of the Court of Federal Claims certifying its decision for interlocutory review under 28 U.S.C. § 1292(d)(2), the order of

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[1] References to "App. ___" are to the appendix filed with this petition.

the Court of Appeals granting interlocutory review, and the order of the Court of Appeals denying petitioner's petition for rehearing are unreported and appear at App. 26a, 29a, 35a, 61a.

JURISDICTION

The judgment of the Court of Appeals on which review is sought was entered on November 13, 1995. App. 24a. Petitioners filed a timely petition for rehearing, which was denied by an order entered on February 7, 1996. App. 61a. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment of the Court of Appeals on writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 provides in relevant part:

> "Any insured depository institution shall be liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the [Federal Deposit Insurance] Corporation reasonably anticipates incurring, after August 9, 1989, in connection with --
>
> (i) the default of a commonly controlled insured depository institution; or
>
> (ii) any assistance provided by the [Federal Deposit Insurance] Corporation to any commonly controlled insured depository institution in danger of default."

12 U.S.C. § 1815(e)(1)(A) (1994). The full text of 12 U.S.C. § 1815(e) is reproduced at App. 63a.

STATEMENT OF THE CASE

1. Introduction. On January 6, 1991, utilizing powers newly granted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), the United States caused the failure of Maine National Bank ("MNB"). The United States seized and permanently appropriated all of MNB's assets and value in order to recoup losses incurred by the government due to the failure of a different bank, Bank of New England, N.A. ("BNE"). MNB was at the time of the seizure a financially healthy institution, with a net worth of approximately $65 million.[2]

On March 5, 1993, petitioner Branch, the Chapter 7 Trustee of MNB's sole shareholder, filed suit on MNB's behalf against the United States in the Court of Federal Claims seeking recovery of not less than $65 million, on the ground that the government's appropriation of MNB's assets constituted a taking under the Fifth Amendment. Jurisdiction was founded upon the Tucker Act, 28 U.S.C. § 1491(a)(1).

On July 20, 1994, in response to cross-motions for summary judgment, the Court of Federal Claims held that, so long as MNB and BNE had maintained separate corporate forms and had operated as separate entities, a taking had occurred. App. 38a. Interlocutory review of that court's decision was subsequently granted pursuant to 28 U.S.C. § 1292(d)(2), App. 26a, 29a, 35a. On November 13, 1995, the Court of Appeals for the Federal Circuit reversed and held that no taking had occurred. App. 1a. Petitioner's petition for rehearing was

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[2] This figure is based on the financial statements of MNB at the time of its seizure.

denied on February 7, 1996. App. 61a. This petition for a writ of certiorari followed.

2. *Factual Background.* The critical facts are few and undisputed. MNB, a federally insured national bank chartered in 1889, had a net worth of $65 million at the time of its seizure. See App. 2a. In 1985 MNB was acquired by Bank of New England Corporation ("BNEC"), a bank holding company that owned numerous other subsidiaries, including BNE. See App. 2a, 39a. MNB always maintained its separate corporate status, and the government does not contend otherwise in this litigation.[3] For over 100 years MNB operated in a legal and economic system where limited corporate liability was respected and well-established, and banking laws and regulations were designed to prevent the failure of one bank from triggering the failure of others.

In 1989, Congress enacted FIRREA, which contained a so-called "cross-guarantee" provision making a federally insured bank liable to the Federal Deposit Insurance Corporation ("FDIC") for losses incurred by the FDIC in connection with the default of a separately incorporated, but commonly owned, sister bank:

> "Any insured depository institution shall be liable for any loss incurred by the [Federal Deposit Insurance] Corporation, or any loss which the [Federal Deposit Insurance] Corporation reasonably anticipates incurring, after August 9, 1989, in connection with –
>
> (i) the default of a commonly controlled insured depository institution * * * ."

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[3] See pages 7-9 below.

12 U.S.C. § 1815(e)(1)(A).[4]

Congress created this new system of liability in response to the practice of some bank holding companies of transferring assets and liabilities among bank subsidiaries in a manner that concentrates bad assets in one bank. In the FDIC's view such practices had increased the burdens on the Bank Insurance Fund,[5] a government fund maintained and administered by the FDIC to carry out its deposit insurance responsibilities.[6] FIRREA, however, requires no finding of mismanagement, wrongdoing, problematic asset transfers or disregard for the corporate form as a predicate for imposing liability on any particular commonly controlled bank.

In the late 1980s, BNE began to experience financial difficulties. After efforts to stem these difficulties proved unsuccessful, the Office of the Comptroller of the Currency ("OCC") on January 6, 1991 declared BNE insolvent, closed it, and appointed the FDIC as receiver.[7] App. 3a. On the very

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[4] FIRREA defines "commonly controlled" as "controlled by the same depository institution holding company" or "controlled by another depository institution." 12 U.S.C. § 1815(e)(9)(A)-(B). A company is deemed to have "control over a bank" if, *inter alia*, "the company directly or indirectly * * * owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank * * *." 12 U.S.C. § 1841(a)(2)(A). MNB and BNE are "commonly controlled" because they are both wholly owned by the same holding company.

[5] See *Condition of the Federal Deposit Insurance Funds: Hearings Before the H. Comm. on Banking, Finance & Urban Affairs*, 100th Cong., 2d Sess. 354-55 (1988) (testimony of FDIC Chairman L. William Seidman).

[6] See 12 U.S.C. § 1821(a)(4)(A).

[7] The Comptroller of the Currency is authorized to close a national bank and appoint a receiver when "[t]he institution's assets are less than the institution's obligations to its creditors and others, including members of the

(continued...)

same day, the FDIC invoked the FIRREA cross-guarantee provision to appropriate MNB's assets and thereby recoup losses anticipated in connection with the BNE failure. See App. 3a.

The FDIC and OCC orchestrated their actions to achieve this goal. The FDIC issued a "Notice of Assessment of Liability" to MNB under FIRREA for $1.016 billion, FDIC's entire anticipated loss from BNE's failure.[8] See App. 3a, 41a. Knowing that MNB could not satisfy the assessment, the OCC immediately declared MNB insolvent and appointed the FDIC as MNB's receiver. See App. 3a, 41a. This had the effect, "by operation of law," of transferring title to all of MNB's assets (real and personal, tangible and intangible) to the government. 12 U.S.C. § 1821(d)(2)(A). The FDIC promptly entered MNB's

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[7](...continued)
institution." 12 U.S.C. §§ 191, 1821(c)(5)(A). The FDIC as receiver of a failed bank is statutorily charged with collecting the bank's assets and paying the bank's debtors, creditors, and administrative expenses, much like a trustee in bankruptcy under the Bankruptcy Code. See 12 U.S.C. § 1821(d). If the receivership does not contain sufficient funds to pay these debts and expenses, the FDIC will use funds from the Bank Insurance Fund. See 12 U.S.C. § 1821.

[8] In April 1992, the FDIC lowered its estimate of BNE losses and MNB's corresponding assessment to $501 million. See App. 72a, 74a-75a. In December 1992 the FDIC further reduced its loss estimate to $477 million, and this time split the assessment between MNB ($99 million) and Connecticut Bank & Trust Company, N.A. ("CBT") ($378 million), a third bank owned by BNEC which had not previously been assessed. App. 74a-76a. (Pursuant to FIRREA, where more than one commonly controlled bank is potentially assessable, the FDIC may allocate its losses among any or all such banks. 12 U.S.C. § 1815(e)(2)(A).) The December 1992 Notice of Assessment provided no reasons for the reallocation of losses among MNB and CBT, and in fact FIRREA provides no standards for making such allocations. In any event, these reductions and reassessments did not help MNB because the current $99 million assessment is still far above MNB's book value of $65 million. See App. 3a.

premises, ousted all of MNB's officers and employees, and took possession of, control over, and title to all of MNB's assets. See App. 3a, 41a, 46a, 54a-56a. The FDIC then transferred these assets to a "bridge" bank newly created and operated by the government itself,[9] and later sold them to a third-party financial institution. See App. 3a, 41a. As then-FDIC Chairman L. William Seidman succinctly stated to Congress, the United States "for the first time, used the cross-guarantee authority to, in effect, fail the Maine National Bank, which was otherwise in sound financial condition."[10] This was done in order to allow the FDIC "to sell the entire Bank of New England holding company banks to one purchaser * * *."[11]

The FDIC assessed MNB for the government's $1 billion anticipated loss from BNE's failure solely because both MNB and BNE were corporations owned by BNEC. The government has never alleged or contended that MNB caused or contributed in any way to BNE's failure, or that MNB or BNE disregarded their separate corporate forms. App. 30a, 32a-33a, 36a, 40a n.1, 51a n.5. Indeed, the United States has expressly conceded in this case that it "does not contend * * * that MNB's corporate veil could have been pierced at common law, or that MNB was responsible for the practices of the other banks" owned by BNEC. App. 30a, 32a-33a. The United States also does not dispute that, prior to the enactment of FIRREA in August 1989,

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[9] Such bridge banks "are totally owned by the FDIC." *The Failure of the Bank of New England: Hearings Before the Senate Comm. on Banking, Housing & Urban* Affairs, 102nd Cong., 1st Sess. 12 (Jan. 9, 1991) (hereinafter "*Hearings*") (statement of Comptroller Clarke). See 12 U.S.C. § 1821(n).

[10] *Hearings, supra* n.9, at 26.

[11] *Id.*

it would not have been able to seize MNB's assets in order to recoup its losses from BNE's failure.[12]

3. The Opinions Below. On cross-motions for summary judgment, the Court of Federal Claims ruled that, so long as MNB and BNE had maintained their separate corporate forms and were not operating as a single entity, a taking had occurred. In reaching this holding, the court emphasized both that the government's actions resulted in "the total physical appropriation of MNB's assets" for the government's benefit, and that MNB had a deeply rooted and well-founded expectation that its assets could not be so appropriated solely because of its status as an affiliate to a failed financial institution. App. 47a, 50a & n.4, 51a, 56a. In the court's view, the FIRREA cross-guarantee provision was "an unforeseeable and radical departure from the system under which MNB had been operating for almost a century." App. 51a. It "swept away over a century of law that had achieved almost hornbook status" by allowing the corporate form "to be pierced automatically if one bank in the [multi-bank] system fails." App. 50a n.4, 59a. FIRREA thus created an "irrebuttable presumption that [all] individual banks in a multi-bank system are manipulating the multi-bank structure* * *." App. 59a. The court accordingly ordered trial on the sole issue of whether MNB had maintained its separate corporate status. App. 60a. Trial was subsequently rendered unnecessary by the government's concession that it did not, and would not, contend "that MNB's corporate veil could have been pierced at common law, or that MNB was responsible

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[12] As then-FDIC Chairman Seidman explained to Congress in 1991,

> "Let me assure you that this [*i.e.*, the seizure of MNB's assets and worth] would have been impossible 5 years ago. Only because new legislation was put in place * * * which allowed cross-guarantees * * * were we able to handle this situation in the way that we did." *Hearings*, *supra* n. 9, at 27.

for the practices of the other banks in BNEC's holding company system * * *." App. 30a, 32a-33a.

On appeal, a panel of the Federal Circuit (Plager, Clevenger, & Bryson, JJ.) reversed, holding that no taking had occurred. The panel deemed it irrelevant for takings purposes that the United States permanently appropriated and later sold MNB's assets. These actions were in the court's view merely a consequence of MNB's inability to satisfy the government's $1 billion assessment under FIRREA. App. 6a. The actual seizure of MNB's assets was, to the court, analogous to a governmental seizure of real property for failure to satisfy a tax lien, or the placing of a truly insolvent bank in receivership. App. 6a, 8a-9a. The court therefore deemed inapposite decisions of this Court holding that the physical appropriation of private property by the government constitutes a taking entitling the claimant to compensation, regardless of the weight of the public purpose underlying the appropriation.[13] See App. 8a. The panel also attributed no significance to the fact that the OCC and FDIC had coordinated their efforts with the express purpose of, in then-Chairman Seidman's words, "fail[ing]" MNB and acquiring for the FDIC's benefit the value of all its assets. See App. 6a; *Hearings*, *supra* n.9, at 26.

Having dismissed the actual physical seizure of MNB's assets as irrelevant, the panel then analyzed whether the underlying assessment itself -- requiring the payment by MNB of $1 billion to the FDIC -- constituted a taking. Reasoning that governmental appropriations of money do not stand on the same constitutional footing as seizures of real property (App. 9a-10a), the court applied the "regulatory takings" analysis developed by this Court in *Penn Central Transportation Co.* v. *New York*

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[13] *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951).

City, 438 U.S. 104 (1978). That analysis is designed to determine the takings status of laws which do not appropriate property for the government but which instead regulate property. It requires the court to consider three factors: (1) the nature of the government action; (2) the severity of the economic impact on the claimant; and (3) the interference with the claimant's reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124.

Applying this framework, the panel determined that no regulatory taking had occurred despite the undisputed facts that: (1) the FIRREA assessment required that MNB permanently transfer money to the government itself; (2) the assessment was in an amount far greater than MNB's net worth and thereby resulted in the annihilation of MNB and loss of all of its assets; and (3) MNB had been operating in reliance on the principle of limited corporate liability for more than 100 years and prior to FIRREA could not have been held liable to the government due to the failure of an affiliated bank. See App. 13a-23a. In reaching this result, the panel emphasized that "the Supreme Court has regarded the Takings Clause as a first cousin [to] the doctrine of substantive due process." App. 12a. Accordingly, broad scope must be accorded to "legislative prerogatives to modify legal rules [of liability] without having to compensate affected parties for the costs resulting from the changes." App. 12a. Reasoning that the cross-guarantee provision has a "rational" basis sufficient to satisfy substantive due process, the court ruled that the government's application of this provision to seize MNB did not effect a taking, even though "the record is devoid of any indication" that MNB had engaged in the type of conduct that spurred enactment of the cross-guarantee provision. App. 16a-18a.

REASONS FOR GRANTING THE WRIT

This case merits review by this Court for three principal reasons. First, although the government did not merely regulate MNB's property -- it seized it -- the Federal Circuit applied a deferential version of the regulatory takings analysis developed by this Court for non-appropriation cases. Utilization of that approach conflicts with (1) this Court's physical seizure decisions such as *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951) and *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) its monetary assessment decisions such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), which deem targeted assessments to be takings unless the assessed party receives commensurate benefits; and (3) its decisions in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 114 S. Ct. 2309 (1994), which invalidate exactions imposed on regulated parties unless the exactions are related to and roughly proportionate to harm caused by the assessed party.

Second, the Federal Circuit's decision sustains and expands a conflict among the federal courts of appeals and state supreme courts over the analytical framework to use in gauging the takings status of targeted monetary assessments. The panel below and the Second Circuit apply a deferential regulatory takings analysis. The D.C. Circuit implements *Webb's* and focuses on the requirement of commensurate individual benefit. The California Supreme Court and Ninth Circuit apply *Nollan/Dolan* and their mandate that exactions be related and roughly proportionate to social costs caused by the assessed party, based on individualized fact finding.

Third, this case presents an issue of national importance. Absent review by this Court, the Tucker Act's jurisdictional provisions ensure that, for all practical purposes, the decision

below will be the law of the land in all takings cases seeking compensation based on assessments made pursuant to the cross-guarantee provision. As such, the government will possess full reign to disregard corporate separateness and to seize private property of targeted banks that neither cause FDIC losses, nor receive benefits from FIRREA, based on no more than common ownership with a failed or failing bank. Such a state of affairs will not only upset the longstanding expectations of MNB, it threatens investment in the banking industry as a whole, and indeed in any regulated industry.

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRECEDENTS OF THIS COURT

The Federal Circuit's decision is in direct conflict with several lines of this Court's takings cases.

A. Pewee Coal and Loretto. This Court has long held that "[w]here the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation," irrespective of the goals or purposes underlying the appropriation. *Yee* v. *City of Escondido,* 503 U.S. 519, 522 (1992).[14] This includes physical seizures of the assets of solvent businesses. Thus, in *Pewee Coal* this Court ruled that, despite the existence of a wage dispute in the mining industry that jeopardized the nation's war efforts, the government could not temporarily take "possession and control" of the assets and operation of the mines without compensating

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[14] See also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (takings clause applicable to "a 'direct appropriation' of property" by the government, "or the functional equivalent of a 'practical ouster of [the owner's] possession'") (citations omitted); *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960) ("total destruction" by the government of petitioner's materialmen's liens is "a Fifth Amendment 'taking'").

the owner. 341 U.S. at 116-17. Similarly, in *Loretto*, the Court ruled that "a permanent physical occupation of property" authorized by the government constitutes a taking, "without regard to whether the action achieves an important public benefit," since it deprives the claimant of the three fundamental attributes of property ownership: the rights "'to possess, use and dispose of'" the property. 458 U.S. at 434-35, 441 (citation omitted). The FDIC's seizure of MNB was thus a paradigmatic taking. The government permanently appropriated full title to and possession of MNB's assets and operations, and transferred them to a bridge bank owned by and operated for the complete benefit of the government.

The Federal Circuit side-stepped the clear import of *Pewee Coal* and *Loretto* by artificially compartmentalizing the government's appropriation of MNB's business into two separate occurrences (assessment and seizure). It then disregarded the seizure on the ground that MNB's inability to satisfy the assessment rendered it insolvent, and the appointment of the FDIC as receiver to control and distribute a bank's assets is a normal and expected consequence of insolvency that has never been considered a taking. App. 6a. The panel's compartmentalized reasoning, however, ignores the undisputed facts here that the governmental decisions to assess and seize were not made independently at different times but were part of a coordinated effort by the government to, in Chairman Seidman's words, "fail" MNB, "thereby allowing [the FDIC] * * * to be able to sell the entire Bank of New England holding company banks to one purchaser * * *." *Hearings, supra* n.9, at 26.

Physical seizures are summarily deemed to be takings because such actions are inconsistent with deeply rooted property right expectations. The panel's dismissal of this Court's physical occupation cases ignores the fact, as found by the Court of Federal Claims, that prior to the enactment of

FIRREA, MNB had reasonable expectations -- grounded in "over a century of law" -- that the FDIC could not without paying compensation oust it of possession of and title to its property simply because its sister corporation might become insolvent. App. 50a & n.4. Such expectations are fundamentally different from those of a bank that has been rendered insolvent by its own practices.[15]

The Federal Circuit's decision rejecting *Pewee Coal* and *Loretto* is certworthy because it provides an easy-to-follow roadmap for governments wishing to avoid the strict takings scrutiny this Court has applied to physical occupations of property -- simply concurrently issue a monetary assessment in excess of the value of the property or the property owner's net worth and the physical occupation will be reviewed under a regulatory takings analysis.

B. Webb's and Sperry. Even if the Federal Circuit had been correct in focusing solely on the FDIC's $1 billion monetary assessment to MNB, its decision still conflicts with this Court's takings precedents. Contrary to the panel's decision, those precedents plainly distinguish between laws adjusting liabilities among private parties, which are subject to a regulatory takings analysis, and laws targeting selected private parties for forced monetary transfers to the government itself.

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[15] Banks rendered insolvent by their own practices have no reasonable expectation, and thus no property interest, in avoiding seizure, since statutes have for over a century given the government the power to close and take over a bank that has become insolvent on its own accord. See Act of June 30, 1876, ch. 156, 19 Stat. 63 (1876); *Banking Act of 1933*, Pub. L. No. 73-66, § 12B, 48 Stat. 162, 168-174 (1933) (authorizing FDIC to act as receiver); *Washington Nat. Bank of Tacoma* v. *Eckels*, 57 F. 870, 872 (C.C.D. Wash. 1893); see also *Golden Pac. Bancorp* v. *United States*, 15 F.3d 1066 (Fed. Cir. 1994); *California Housing Sec., Inc.* v. *United States*, 959 F.2d 955 (Fed. Cir. 1992).

The former situation is exemplified by this Court's decisions in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) and *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), two cases that were heavily relied upon by the Federal Circuit. *Connolly* and *Concrete Pipe* both involved takings challenges by private employers to a provision of the Employee Retirement Income Security Act of 1974 ("ERISA") requiring a monetary payment under certain circumstances by one private person (the employer) to another (a private pension trust). The statutory provision at issue did *not*, however, mandate payments to or create liabilities to the government itself -- a point repeatedly emphasized by this Court.[16] Because the government itself was not appropriating the money in question, but regulating financial burdens among private parties *inter se*, this Court applied the regulatory takings framework to determine whether a taking had occurred.[17]

This Court has taken a different tact, however, where the *government itself* has appropriated a claimant's money or net worth through a targeted assessment. In such cases, the Court has ruled that the government's appropriation will constitute a taking, unless the assessment is a fair approximation of government services rendered or public benefits provided in return to the burdened party. Thus, in *Webb's*, 449 U.S. 155, this Court found a taking where the Florida courts had appropriated all of the interest accruing on certain private funds deposited with the courts. The Court emphasized that the

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[16] See *Connolly*, 475 at 222, 224, 225 (liabilities are "not to the Government, but to a pension trust"; "the United States has taken nothing for its own use"; "the Government [did] not physically invade or permanently appropriate any of the employer's assets for its own use"); *Concrete Pipe*, 508 U.S. at 644 (same).

[17] *Connolly*, 475 U.S. at 224-27; *Concrete Pipe*, 508 U.S. at 643-47.

appropriation did not merely restrict the owners' use of the interest, or exact a small charge "reasonably related to the costs of using the courts." *Id.* at 163. It was, rather, a "forced contribution" of all the interest to the government. *Id.* The Court concluded (*id.* at 163-64) that this forced contribution was as much a taking as the physical invasion of real property ruled a taking in *United States* v. *Causby*, 328 U.S. 256 (1946).

This Court employed the same analysis in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), which involved a takings challenge to a 1.5 percent fee charged by the United States against an award made by the Iran-United States Claims Tribunal. The fee was assessed to reimburse the government for costs incurred in connection with arbitration of claims by private parties against Iran before the Tribunal. *Id.* at 60. In ruling that no taking had occurred, the Court emphasized that the fee at issue was a small percentage of the claimant's monetary award and a "'fair approximation of the cost of benefits supplied'" by the government to the claimant. It was thus a valid user fee for which no compensation was required. *Id.* (citation omitted). Citing its prior decision in *Webb's*, the Court also emphasized that a different result would obtain were the government to have "appropriated all, or most, of the [claimant's] award to itself and labeled the booty as a user fee." *Id.* at 62 (citing *Webb's*, 449 U.S. 155).

Because the monetary assessment here required a permanent transfer of money to the government itself, it was a direct and permanent governmental appropriation of property. The Federal Circuit should therefore have applied this Court's analysis in *Webb's* and *Sperry* rather than a regulatory takings analysis. Had it done so, a taking would have been found, since (1) the government appropriated *all*, not a small percentage of, MNB's worth; and (2) MNB received no commensurate benefits or services as a result of FIRREA's enactment. To the contrary, FIRREA resulted in MNB's total annihilation. Thus, the

assessment against MNB is just like the "forced contribution" that was a taking in *Webb's* and the "booty" disguised as a user fee that this Court warned about in *Sperry*.

C. Dolan and Nollan. The Federal Circuit's analysis is also in conflict with decisions of this Court that address the takings status of targeted exactions imposed by government on property owners as a condition of property development approvals or other regulatory permits. See *Dolan*, 114 S. Ct. 2309; *Nollan*, 483 U.S. 825. The Court has held that such governmental exactions constitute takings unless there is both (a) an "essential nexus" between the nature of the exaction and the type of harm created by the proposed development or activity that the exaction is designed to ameliorate; and (b) a "rough proportionality," based on individualized fact finding, between the extent of the exaction imposed on the property owner and the social costs created by the proposed development or activity at issue. *Dolan*, 114 S. Ct. at 2317-19; *Nollan*, 483 U.S. at 837.

The Federal Circuit reasoned that the assessment and appropriation of MNB pursuant to FIRREA's cross-guarantee provision may be viewed as an exaction imposed by the government as a condition of MNB retaining its status as a member of a bank holding company family. App. 16a. If that line of analysis is logically pursued, however, *Dolan* and *Nollan* show that the assessment must be deemed a compensable taking. First, there is no "essential nexus" between the $1 billion exaction visited upon MNB and the harm sought to be ameliorated. It is undisputed here that MNB always maintained its separate corporate form and did not contribute to the failure of BNE or otherwise engage in the kind of practices increasing the FDIC's losses that the FIRREA cross-guarantee provision was designed to counteract. Second, for the same reason, there is no "rough proportionality" between the amount of the exaction ($1 billion) and the precise harm caused by MNB itself

due to its membership in a holding company family (none).[18] Indeed, the government never even attempted to make an individualized determination whether a "rough proportionality" existed.[19] Rather, MNB is being made to bear the government's losses based simply on its status as a sister corporation to BNE.

D. Connolly and Concrete Pipe. The Federal Circuit erred in treating this case as a regulatory takings case governed exclusively by *Connolly* and *Concrete Pipe*. As shown above, the Federal Circuit incorrectly disregarded the teachings of the physical appropriation cases like *Pewee Coal*, the monetary assessment cases like *Webb's*, and the essential nexus/rough proportionality cases like *Dolan*. But even if the regulatory takings cases such as *Connolly* and *Concrete Pipe* were the exclusively relevant precedents here, this Court should grant certiorari to make clear that the three-factor regulatory takings analysis does not relegate the "Takings Clause of the Fifth Amendment * * * to the status of a poor relation" to the Due Process Clause or other Bill of Rights protections. See *Dolan*,

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[18] As one commentator noted, the cross-guarantee provision

"is inherently unfair and not clearly constitutional. [It] permits the FDIC to impose liability on healthy institutions without regard to whether they were operated independently of the failed bank and notwithstanding the absence of fraudulent transactions." David A. Segal, Note, *A Note to Congress and the FDIC: After FIRREA, Where's the BIF?*, 59 Fordham L. Rev. S411, S450 (1991) (footnote omitted).

[19] The lack of a nexus between the assessment and any causal responsibility of the assessed bank is well demonstrated by the FDIC's decisions to seize MNB by assessing it for the entire loss from BNE's failure and then nearly two years later to reallocate a large percentage of the loss to BNEC's third subsidiary bank, CBT. See note 8, *supra*. The FDIC never stated any reason for its assessment allocations, and indeed FIRREA includes no standards for making such allocations. *Id.* Rather, the specific targets of FIRREA assessments are left to FDIC's unbridled discretion.

114 S. Ct. at 2320. The Federal Circuit's interpretation of the test, if allowed to stand, will have just that consequence.

Thus, when analyzing the nature of the government action, the panel concluded that this case is the same as *Connolly* and *Concrete Pipe*, when it is not. See App. 15a. As noted above, those cases involved laws which merely created a liability between private persons; this case involves a required permanent transfer of money to the government itself. The Federal Circuit's analysis means that the government has as much latitude to appropriate a regulated entity's property without paying compensation as it does to regulate its use. That has never been the law before.[20]

Second, when assessing the severity of the economic impact on MNB, the panel misapplied *Connolly* and *Concrete Pipe* by giving no weight to the fact that MNB's entire net worth was eviscerated. Contrary to those cases, the panel did not consider the actual economic impact of the assessment on MNB or whether the assessed liability was "out of proportion" to the benefits MNB received or social harms it caused. See *Connolly*, 475 U.S. at 226; *Concrete Pipe*, 508 U.S. at 645. Instead, taking statements by this Court in *Connolly* and *Concrete Pipe* out of context, the panel devoted a large portion of its opinion to discussions of the rationality of FIRREA's cross-guarantee provision (and thus its consistency with substantive due process). See App. 12a, 16a-18a. The Federal Circuit thus relegated the Takings Clause to little more than an echo of substantive due process. This may or may not be appropriate when a takings challenge concerns a law regulating liabilities among private parties, such as in *Connolly*. But certainly the

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[20] See, *e.g.*, *Penn Central*, 438 U.S. at 124 (taking "may more readily be found" when "the interference with property can be characterized as a physical invasion by government").

Takings Clause has independent force and requires compensation when, as here, the government makes private property government property.

Third, when evaluating the interference with MNB's specific reasonable investment-backed expectations, the Federal Circuit -- again paraphrasing *Connolly* -- stated that banking is a highly regulated industry and that the limited liability principle has not been sacrosanct in all fields or even in the banking field for all time. App. 18a-23a. The panel failed to recognize, however, that for the 100 years of MNB's existence prior to FIRREA, no law had ever allowed the *government itself* deliberately to fail a bank, or allowed any entity -- public or private -- to appropriate *all* of a bank's assets simply due to the failing of a separately incorporated and managed sister bank, in the absence of fraud, misconduct, or some other wrongdoing sufficient to allow "piercing of the corporate veil."[21]

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[21] See Jeffrey M. Cooper, Note, *Out on a Limb: FIRREA's Cross-Guarantee Provision 'Takes' Root in Branch* v. *United States*, 33 Hous. L. Rev. 299, 323 n.217 (1996) ("None of the examples [in the Federal Circuit's opinion] involves a corporate entity being held liable for the debts of another entity based solely on common ownership."). There are several defects in the Federal Circuit's argument that prior regulatory actions presaged FIRREA's cross-guarantee provision and thus reduced MNB's legitimate expectations: (1) these actions postdated MNB's entry into the banking business; (2) they did not even hint that a bank could be failed and seized simply because of its common ownership with a failed bank; (3) they involved facts, such as contractual conditions on open-bank assistance or subordination of affiliate transactions, not applicable to MNB; and (4) certain of these prior actions were struck down by the courts. See *First Empire Bank v. FDIC*, 572 F.2d 1361 (9th Cir. 1978) (striking down discriminatory terms for satisfying claims of affiliates against a failed bank in receivership); *MCorp Fin., Inc. v. Board of Governors Fed. Reserve Sys.*, 900 F.2d 852 (5th Cir. 1990) (striking down "source-of-strength" regulation), *reversed on jurisdictional grounds*, 502 U.S. 32 (1991).

To the contrary, there has been in place for decades a national policy of *protecting* one bank from another's failure, whether or not the banks are commonly owned. Thus, since 1933, the government has adopted and implemented laws designed to spread the cost of bank failures through industry-wide deposit insurance and thereby to prevent one bank's insolvency from triggering another's.[22] Indeed, the FDIC itself has repeatedly stated that an important part of its job is to insulate one bank from another's failure.[23] As FDIC Chairman Seidman explained to Congress, prior to the enactment of FIRREA in 1989, the FDIC would not have even attempted -- much less been able -- to appropriate MNB's assets solely because it and BNE were commonly owned.[24]

That banking is highly regulated does not mean that banks can have no reasonable expectations to be free from government appropriation. As the D.C. Circuit has stated,

> "In this era of pervasive regulation, this [would] prove far too much [since] almost any entity could [then] be said to have a

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[22] Banking Act of 1933, Pub. L. No. 73-66, § 12B, 48 Stat. 162, 168 (1933), *repealed and reenacted by* Federal Deposit Insurance Act, Pub. L. No. 81-797, § 1, 64 Stat. 873 (1950) (codified at 12 U.S.C. § 1811 *et seq.*).

[23] See Federal Deposit Insurance Corporation Staff Study, *Deposit Insurance for the Nineties: Meeting the Challenge* 198 (Jan. 4, 1989); see also Federal Deposit Insurance Corporation, *Deposit Insurance in a Changing Environment: A Study of the Current System of Deposit Insurance Pursuant to Section 712 of the Garn-St. Germain Depository Institution Act of 1982* xi (submitted Apr. 15, 1983).

[24] *Hearings*, *supra* n.9, at 27; *accord* Cooper, *supra* n.21, at 323 ("The cross-guarantee provision was an unforeseeable change in the law and a radical departure from the historic banking policy of insulating banks from the failure of other banks.").

> reasonable expectation of governmental intrusion."

Colorado Springs Prod. Credit Ass'n v. *Farm Credit Admin.*, 967 F.2d 648, 655 n.8 (D.C. Cir. 1992).[25]

II. THE DECISION BELOW SUSTAINS AND EXPANDS A CONFLICT AMONG THE CIRCUITS AND STATE SUPREME COURTS

An equally compelling reason to grant certiorari is that there exists significant conflict and confusion among the courts of appeals and state supreme courts as to the takings principles applicable to targeted governmental assessments directed at private parties. The Federal Circuit panel below, as well as the

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[25] Congress' handling of the reorganization of another troubled (and heavily regulated) industry -- the nation's railroads -- offers further support for MNB's position, for it shows that both Congress and this Court have recognized that a compensable taking occurs when the government mandates combination of the assets and liabilities of different regulated corporations into a single entity. In 1973, Congress passed the Regional Rail Reorganization Act of 1973 ("Rail Act"), 45 U.S.C. § 701 *et seq.*, which reorganized eight major railroads that had filed for reorganization in bankruptcy into a single system operated by a private corporation, the Consolidated Rail Corporation ("Conrail"). The railroads were required to transfer designated assets to Conrail, and in exchange were provided Conrail securities, United States Railway Association obligations, and other benefits. In the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), railroad creditors and a sole shareholder objected that the Rail Act did not guarantee them the fair value of their claims and therefore constituted a taking. This Court agreed that "any deficiency of constitutional magnitude in the value of the limited compensation provided under the Act will indeed be a taking" but held that the Act "provide[d] adequate assurance that any taking will be compensated" because it permitted a Tucker Act suit for compensation "to cover any constitutional shortfall." *Id.* at 155.

Second Circuit,[26] have applied the regulatory takings framework developed by this Court in *Penn Central,* and refined in *Connolly* and *Concrete Pipe*, to gauge the takings status of assessments under FIRREA. In so doing they have treated governmental assessments the same as laws which do not require transfers of money to the government itself, but which instead merely create or adjust rules of liability among private persons *inter se*.

By contrast, the District of Columbia Circuit eschewed application of the *Penn Central* test when determining the takings status of a law requiring certain financial institutions to contribute money to a government corporation. *Colorado Springs,* 967 F.2d 648. The law at issue in *Colorado Springs* required the financial institutions to make a one-time purchase of stock from the Farm Credit System Financial Assistance Corporation ("FAC"), a government corporation created by the law. Because the FAC's stock "had no market value and paid no dividends," the stock purchase requirement effectively forced the financial institutions to "transfer substantial amounts of their capital" to the FAC. *Id.* at 650, 652.

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[26] See *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449 (2d Cir. 1995). In *Meriden,* the court merely addressed whether use of the cross guarantee assessment by the FDIC effected a regulatory taking under this Court's decisions. It did not even consider the other lines of this Court's takings jurisprudence discussed in this petition.

The *Meriden* case is quite different factually from the case at bar. There, as the Second Circuit emphasized, Meriden *chose* to remain subject to the cross-guarantee provision even after it ceased commercial banking operations, solely to assure that non-public deposits owned by its parent and sister bank would continue to be insured by the FDIC. *Id.* at 451, 455. Moreover, Meriden had in fact directly contributed to its sister bank's failure by transferring its liabilities to that bank. *Id.* at 455.

Rather than applying *Penn Central*, the D.C. Circuit utilized the takings framework established by this Court in *Webb's* and *Sperry*. Consistent with these cases, the court focused upon whether the stock purchase requirement was a "'fair approximation'" of benefits supplied to the financial institutions by the law creating the FAC. That law was passed in the wake of a financial crisis in the Farm Credit System and, the court believed, prevented an exacerbation of that crisis that would have put these institutions out of business altogether. *Id.* at 655-57 (citation omitted). The court ultimately concluded that no taking had occurred because the financial institutions "derived benefit from the Act roughly commensurate with the burdens they were forced to bear." *Id.* at 655.[27] As shown above, the FDIC's assessment of MNB wholly fails this test. See pages 15-17 *supra*.

The Ninth Circuit and the Supreme Court of California have taken a related tact and applied *Nollan* and *Dolan* when evaluating the takings status of targeted assessments. *Commercial Builders of Northern California* v. *City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), involved a takings challenge to an ordinance requiring developers seeking building permits to make monetary payments to the government to offset anticipated burdens to the government caused by the building project. The Ninth Circuit ruled that, pursuant to this Court's decision in *Nollan*, the takings status of such a required payment depends on whether it is reasonably related to the "social cost" and other burdens that will be caused by a development project.

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[27] Similarly, the Ninth Circuit, relying on *Webb's*, invalidated Nevada's appropriation of the interest accrued on funds in an inmate's personal prisoner account. *Tellis* v. *Godinez*, 5 F.3d 1314 (9th Cir. 1993). See also *Blumberg* v. *Pinellas County*, 836 F. Supp. 839, 844-46 (M.D. Fla. 1993) (public utility's failure to return to customers interest earned on customer deposits constitutes taking, where no proportionate benefit received by customers).

Id. at 875 ("where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld").

Similarly, the Supreme Court of California recently ruled that this Court's *Nollan* and *Dolan* cases govern the takings status of monetary exactions imposed on property owners as a condition of rezoning approvals, at least where the monetary exactions are imposed "neither generally nor ministerially, but on an individual and discretionary basis." *Ehrlich* v. *City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 444 (1996). Applying that framework, the court invalidated a $280,000 assessment because there had been no showing, based on individualized fact finding, of a "rough proportionality" between the amount of the exaction and the particular adverse public impacts of the land use changes sought by the claimant. The court also unequivocally rejected the "substantive due process" approach embraced by the Federal Circuit in the instant case:

> "[T]he takings clause [is] an independent constitutional guarantee, one that is not only distinct from the commands of the due process and equal protection provisions of the federal constitution, but which embodies a standard of judicial review that is greater than the 'minimal level of scrutiny' mandated by those provisions." 911 P.2d at 437.

If the Ninth Circuit and California Supreme Court are correct in applying *Nollan/Dolan* to monetary assessments, the FDIC's assessment of MNB was a taking, as previously shown. See pages 17-18, *supra*. Moreover, the conflict on this issue is not limited to the Federal and Second Circuits, on the one hand, and the Ninth Circuit and California Supreme Court, on the other. The Court of Appeals of New York has ruled that the *Nollan*

"essential nexus" test provides a framework of analysis for all takings claims. *Manocherian* v. *Lenox Hill Hosp.*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479, 482-83 (1994). By contrast, the Tenth Circuit in *Clajon Production Corp.* v. *Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) concluded that the *Nollan* and *Dolan* tests "are limited to the context of development exactions where there is a physical taking or its equivalent." The Court of Appeals of Maryland has likewise construed *Dolan* as limited to exactions involving required transfers of real property interests to the government. See *Waters Landing Ltd. Partnership* v. *Montgomery County*, 337 Md. 15, 650 A.2d 712, 724 (1994).

In summary, the law on the status of targeted government monetary assessments such as that imposed on MNB is in considerable disarray. The Federal Circuit and Second Circuit have applied a deferential version of regulatory takings analysis, without requiring that the assessment be reasonably related to benefits received or social costs imposed by the assessed party. The D.C. Circuit has ruled in line with *Webb's* that the touchstone is whether the assessed party received commensurate benefits. The Ninth Circuit and Supreme Court of California have ruled that monetary assessments on regulated parties should be judged pursuant to the *Nollan/Dolan* requirements of essential nexus between the exaction and the social costs imposed by the assessed party's activity, including whether they are roughly proportional based on individualized fact finding. The New York Court of Appeals applies *Nollan* to all takings cases. On the other hand, the Tenth Circuit and Court of Appeals of Maryland limit *Nollan* and *Dolan* to required real property dedications.

This Court should accordingly take this case to provide much needed guidance regarding the takings analysis applicable to targeted governmental monetary assessments.

III. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

This is a case of national importance. The assets of a healthy private business have simply been appropriated by government fiat, without fair warning, opportunity to escape, or responsibility on the business' part, and purely for government gain. The Federal Circuit's decision has profound implications not only for the banking industry, but for all businesses that raise capital and conduct their operations in reliance on the principle that the corporate form has meaning. That principle, and the corresponding ability of businesses to attract capital, would be severely eroded if the government has *carte blanche* to appropriate the assets of one corporation to pay for governmental losses caused by another corporation without confronting the requirements of the Takings Clause.

The FIRREA cross-guarantee provision irrebuttably "presumes that all banks in a banking system are abusing their independent legal form and therefore each bank should be responsible for all other banks within that system."[28] As a result, the Federal Circuit's decision allows the government, "by *ipse dixit*, [to] transform private property [owned by an innocent bank] into public property without compensation," *Webb's* , 449 U.S. at 164, based on nothing more than common ownership with a bank that has failed or is on the brink of failure. There is no need for the government to show wrongdoing, misconduct, or abuse of the corporate form, nor any requirement that it take cognizance of the settled investment-backed expectations of the bank or its investors.

Although the case at bar involves the forced failure of only one bank, that failure alone amounts to a governmental

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[28] Cooper, *supra* n.21, at 325.

appropriation of a private business with a net worth of $65 million. Equally important, the Federal Circuit's decision will govern all future takings claims against the United States involving the FIRREA cross-guarantee provision and seeking money damages in excess of $10,000, because Congress has vested jurisdiction over such claims only in the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1346(a)(2). Thus, there is little point in waiting for this issue to percolate further.[29]

If the decision below is allowed to stand, existing investments in insured depository institutions with affiliates will potentially be at risk due to the financial condition of separate sister banks even though such risks would not reasonably have been considered in connection with investments made prior to FIRREA's enactment, and even though Congress did not in FIRREA provide a transition period before imposing the cross-guarantee provision or exclude pre-existing investments from unfair destruction by the new statutory scheme. The result will be a loss of confidence in, and less infusion of capital into, the

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[29] The importance of the issue is also illustrated by the volume of scholarly commentary analyzing the takings status of assessments under FIRREA's cross-guarantee provision. *Compare* Cooper, *supra* n.21, at 317-24 (provision effects a taking under regulatory takings framework); Jennifer B. Arlin, Note, *Of Property Rights and the Fifth Amendment: FIRREA's Cross-Guarantee Reexamined*, 33 Wm. & Mary L. Rev. 293, 311, 328-32 (1991) (questioning provision's constitutionality); Segal, *supra* n.18, at S450, S451 (provision "is inherently unfair and not clearly constitutional"; "* * * [e]nforcement of the cross-guarantee may constitute a taking"); *and* David L. Glass, *Cross-Guarantee Is Seen as Risk to Holding Companies*, Am. Banker, July 19, 1990, at 25 ("[s]ome observers have questioned whether" cross-guarantee is a taking) *with* Christopher T. Curtis, *The Takings Clause and Regulatory Takeovers of Banks and Thrifts*, 27 Harv. J. on Legis. 367, 389 (1990) (provision does not effect taking), *and* Jennifer J. Alexander, Note, *Is the Cross-Guarantee Constitutional?*, 48 Vand. L. Rev. 1741, 1785-1801 (1995) (same).

banking industry -- a cornerstone of this nation's economy -- due to uncertainties over the safety of such investments now or in the future.[30]

Indeed, the Federal Circuit's decision poses a threat to investment in any regulated industry and calls into question the ability of investors to rely upon the corporate limited liability concept in any business across the nation. Review of the Federal Circuit's decision will provide the Court with the opportunity to determine how far Congress may go in seeking to remedy a national problem on the backs of a selected few.

Given the gravity and unfairness of the economic consequences resulting to MNB from the Federal Circuit's decision, the impact of that decision on existing and future investments in banks or other regulated industries, and the fact that all takings claims seeking compensation for property seized under the cross-guarantee provision will, for all practical purposes, be governed by the Federal Circuit's decision, the issues in the case at bar should be resolved by this Court at the present time.

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[30] See Alexander, *supra* n.29, at 1749 ("The ultimate decision regarding the constitutionality of the [FIRREA] cross-guarantee will have tremendous impact. * * * Whichever way the issue is decided will have lasting effects on financial institution reformers, shareholders, and taxpayers.").

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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